

1970

Legislative Review

Craig W. Thompson

University of Nebraska College of Law

William J. Wochner

University of Nebraska College of Law, wochner@sbcglobal.net

Follow this and additional works at: <https://digitalcommons.unl.edu/nlr>

Recommended Citation

Craig W. Thompson and William J. Wochner, *Legislative Review*, 49 Neb. L. Rev. 598 (1970)

Available at: <https://digitalcommons.unl.edu/nlr/vol49/iss3/6>

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

LEGISLATIVE REVIEW

In furtherance of the *Review's* attempt this year to bring more material to the Nebraska lawyer which is of interest to him, the Editors have decided to present a review of the 1969 Unicameral session. This review is by no means a complete synopsis of the bills passed by the legislature in the eightieth session. Because of the great number of bills presented to the session and eventually passed, we have attempted to select a small cross-section of bills which were felt to be of particular interest to the practicing attorney.

The bills discussed in this article were chosen because of their particular relevance to the attorney as an attorney, as opposed to the attorney as a general member of society. There undoubtedly are other bills which would have been of more special interest to particular individuals, but because of time and space limitations adequate justice to a larger number of bills could not be done.

The selections discussed in the article are presented here in outline form to enable the reader to select those which are of particular interest to him and to enable him to grasp the idea of the breadth of the article.

I. County Attorneys

- A. L.B. 1059—Required experience.
- B. L.B. 237—Attorneys for hospital districts.
- C. L.B. 1179—Salaries and private practice.
- D. L.B. 421—Acting and assistant county attorneys.
- E. L.B. 154 and L.B. 155—Sovereign immunity.

II. The Courts

- A. L.B. 166—Workmen's compensation judges—outside practice.
- B. L.B. 493—Workmen's compensation judges—salaries.
- C. L.B. 15—Court of industrial relations.

III. Public Counsel

- A. L.B. 521—Ombudsman.
- B. L.B. 950—Public defender.

IV. L.B. 330—Professional corporations

V. Post-Conviction

- A. L.B. 908—Civil rights restored and expungement of conviction.
- B. L.B. 444—Execution of juvenile court orders while on appeal.

VI. Taxes

- A. L.B. 1415—Bonds required for non-resident contractors.
- B. State priority in the collection of taxes.
 - 1. L.B. 1359—Sales taxes collected constitute a trust in hands of the retailer.
 - 2. L.B. 1363—Withholding taxes constitute a trust fund in the hands of the employer.
 - 3. L.B. 1361—Lien on property for taxes due.
- C. L.B. 504—Changes in language and substance of tax law.

VII. Motor Vehicles

- A. L.B. 1174—Title to motor vehicles.
- B. L.B. 994—Right-of-way at intersections.

Thomas D. Sutherland '70
Legislation Editor

I. COUNTY ATTORNEYS

On the local level, the office of county attorney is widely recognized as one of the more important public positions.¹ In this area there are two major problems—low salaries and increasing workloads. The last session of the legislature, realizing the existence of these problems, utilized a number of devices in an attempt to deal with them.

A. L.B. 1059—REQUIRED EXPERIENCE.

L.B. 1059 is intended to insure that one who holds the office of county attorney has at least two years experience. The bill includes a requirement that applicants for the office of county attorney in fourth, fifth, sixth, and seventh class counties practice law in Nebraska for at least two years before taking office.² However, because of the difficulty some counties are having or might have in obtaining applicants for this position, the bill contains a waiver clause. If no person who meets this qualification files for the office ten days before the filing deadline, the restriction is removed.

B. L.B. 237—ATTORNEYS FOR HOSPITAL DISTRICTS.

One of the recently passed bills which should lighten the workload of the county attorney is L.B. 237. This bill relieves the county attorney from the responsibility of representing hospital districts

¹ L.B. 421, *Files of Judiciary Committee*, 80th Neb. Leg. Sess. (1969).

² The limitations of these counties are as follows: class four, sixteen thousand and less than twenty thousand; class five, twenty thousand and less than sixty thousand; class six, sixty thousand and less than two hundred thousand; and class seven, counties of two hundred thousand inhabitants or more.

and empowers the hospital districts to employ their own legal counsel. The committee reports on this bill indicate that this development was made necessary because of the expansion of hospital districts in various parts of the state, and made possible because the districts have the power to tax and are therefore in a position to hire their own attorneys.³ It was felt the legal requirements of such districts would be so great that the county attorney would not have sufficient time to devote to his other areas of responsibility.⁴

C. L.B. 1179—SALARIES AND PRIVATE PRACTICE.

L.B. 1179 is intended to remove the temptation for the county attorney to devote the major part of his time to any private practice he might have, while neglecting his less lucrative duties as county attorney. The bill provides that in fifth-class counties, the county attorney shall be paid at least \$5,400 and further states that: "In fixing the salary of the county attorney, the county board may provide that the county attorney shall devote full time to his official duties and engage in no private legal practice of any kind."⁵ The usefulness of the requirement that the county attorney devote full time to the office is questioned by some who point out that to require a lawyer to forego any private practice during his term is to put him in the position of starting in much the same position as a recent law school graduate if he is defeated for re-election.⁶ This argument is weakened by the number of county attorneys who have successfully returned to private practice, after serving as county attorney without engaging in private practice while in office.⁷ However, most of these cases occurred in the larger counties, since these are at present the only counties where the county attorney does not maintain a private practice.

The legislature realized that it is not practical for all counties to have a full-time county attorney. Therefore, the bill was designed to apply only to fifth class counties, and the discretion to invoke the provisions of the bill is placed in the county board. It is hoped that judicious use of L.B. 1179 may be a valuable tool which can be used together with adequate salaries to reduce backlogs which now exist in some county attorneys' offices.⁸ The salary minimum of \$5,400 is of doubtful significance. The most frequently mentioned

³ L.B. 237, *Files of Judiciary Committee*, 80th Neb. Leg. Sess. (1969).

⁴ *Id.*

⁵ L.B. 1179, § 1, 80th Neb. Leg. Sess. (1969).

⁶ L.B. 1179, *Files of Judiciary Committee*, 80th Neb. Leg. Sess. (1969).

⁷ Personal interview with William Blue, Deputy County Attorney, Lancaster County, Nebraska (Oct. 28, 1969).

⁸ L.B. 1179, § 1, 80th Neb. Leg. Sess. (1969).

salary for a fulltime county attorney is between \$15,000-\$20,000 and some counties which have paid \$5,400 or less in the past, have found it difficult to obtain qualified attorneys.⁹

D. L.B. 421—ACTING AND ASSISTANT COUNTY ATTORNEYS.

A fourth bill designed to aid the county attorney in the performance of his duties and upgrade the quality of service provided to the public is L.B. 421. The main effect of this bill is to amend sections 23-1204.01 and 23-1205 of the Nebraska Revised Statutes. The bill expands the situations in which special assistants and acting county attorneys may be appointed. The purpose of the bill, as expressed by its sponsor, is to provide, upon a showing of good cause, for those situations where the county attorney is unable to perform his duties because of leave of absence, sickness or conflict of interest, and to provide for the appointment of assistants.¹⁰

The usefulness of this bill would seem to lie mainly in those cases where the county attorney is allowed to maintain an outside practice and the investigation of a felony would involve a conflict of interest. In a case such as this, L.B. 421 expands section 23-1204.01 which previously provided only for assistance in the trial and did not provide for any preliminary investigation and appearances which might have been required.

E. L.B. 154 AND L.B. 155—SOVEREIGN IMMUNITY.

In addition to the aforementioned bills, which in general are intended to enable a county attorney to devote more of his time to the traditional duties of the office, and which have to some degree limited those duties, the legislature passed L.B. 154 and L.B. 155. These bills will possibly increase the work load of not only the county attorney but the city attorney as well. Furthermore, where one individual serves both as county attorney and city attorney, the increased workload will be especially significant. In order to understand how these two bills will affect county and city attorneys' duties it is important to review briefly the doctrine of sovereign immunity.

In passing L.B. 154 abolishing State immunity, and L.B. 155 limiting the immunity of political subdivisions, the Nebraska Legislature seems to be joining what has become a national trend toward abolishing governmental immunity.¹¹ Two early cases estab-

⁹ *Id.*

¹⁰ L.B. 421, *Files of Judiciary Committee*, 80th Neb. Leg. Sess. (1969) (introduced by Senator Fred Carstens, Chairman, Judiciary Committee).

¹¹ Greenhill, *Should Governmental Immunity for Torts Be Re-examined, and, If So by Whom?*, 31 Tex. B.J. 1036 (1968) [hereinafter cited as Greenhill].

lished the governmental proprietary test of sovereign immunity in Nebraska. One, decided in 1904,¹² held that damages were not recoverable against municipal governments because of delay or neglect of their mayor and city council in the performance of a ministerial duty. The other, decided in 1913,¹³ held that when a municipal corporation engages in a purely business enterprise it is bound by the same rules applicable to any other person or corporation.

One major issue that had to be decided before this tradition of governmental immunity could be abolished in Nebraska was whether the courts could properly undertake to abolish the doctrine or whether such action would be infringing on the powers of the legislature. Court action abolishing immunity can cause a number of problems. In California, the problems caused by such action by the courts were so great the legislature was forced to suspend the ruling for two years.¹⁴ The Supreme Court of Nebraska, realizing the problems that might be caused by abolition of governmental immunity from tort claims and also realizing that the legislature was in a better position to deal with these problems, refused to abolish all governmental immunity.

However, the court had weakened the doctrine considerably in recent decisions. In *Brown v. City of Omaha*,¹⁵ a case involving injuries resulting from alleged negligence in the operation of a police car, the court held that cities and other governmental subdivisions were not necessarily immune to tort suits arising out of the ownership and use of motor vehicles. While this decision was carefully limited in scope and applied prospectively to only those cases arising thirty days after the opinion was filed, it served as notice to the legislature to act in this area.¹⁶

¹² *Gordon v. City of Omaha*, 71 Neb. 570, 99 N.W. 242 (1904).

¹³ *Henry v. City of Lincoln*, 93 Neb. 331, 140 N.W. 664 (1913).

¹⁴ Greenhill, note 11 *supra*, at 1069.

¹⁵ 183 Neb. 430, 160 N.W.2d 805 (1968).

¹⁶ The doctrine of sovereign immunity was further restricted in *Johnson v. Municipal University of Omaha*, 184 Neb. 512, 169 N.W.2d 286 (1969), where the Nebraska Supreme Court stated: "We now hold that cities, counties, and all other governmental subdivisions, and local public entities of this state, including municipal universities, are not immune from tort liability arising out of a physical condition, affirmatively and voluntarily created by the public body on its premises, where the existence of the condition is not reasonably visible or apparent, and where the condition constitutes an unreasonable risk of harm to persons authorized to use and reasonably using the premises for the purposes intended." *Id.* at 515, 169 N.W.2d at 288-89.

Prompted by actions of the Nebraska Supreme Court and article five, section twenty-two of the Nebraska Constitution¹⁷ the Nebraska Legislature has greatly restricted the use of sovereign immunity in Nebraska. L.B. 154 deprives the state of the use of the doctrine of sovereign immunity for most torts committed by its officers, agents and employees. Its companion bill, L.B. 155, similarly restricts the immunity of governmental subdivisions. In addition, L.B. 155 provides for a standardized procedure for bringing tort claims against political subdivisions under various state statutes.¹⁸ Previously there had been a wide disparity in the requirements of such statutes. For example, section 39-809 provided that suits for damage resulting from bridge, culvert or highway construction must be brought within ninety days from the time the damage was sustained, while actions for damages against airport authorities could be brought for up to a year after the cause of action arose, without prior notice.

One significant result of these two bills should be to increase the number of cases involving governmental liability that will have to be litigated. In addition, the county and city attorneys will have to procure insurance for the subdivisions they represent.

II. THE COURTS

A. L.B. 166—WORKMEN'S COMPENSATION JUDGES—OUTSIDE PRACTICE.

Another area that is worthy of examination is the legislation passed in the last legislative session dealing with judges of the Nebraska Workmen's Compensation Court. L.B. 166 amends section 7-111 of the Nebraska statutes to include Workmen's Compensation Court judges within the prohibition placed on certain county and municipal judges against engaging in outside practice. The committee reports indicate that this limitation was not imposed because of any alleged conflicts of interest involving any of the judges. In fact, none of the judges of the Workmen's Compensation Court engage in outside practice and the purpose of the bill was to eliminate the lack of any restriction against such practice.¹⁹

B. L.B. 493—WORKMEN'S COMPENSATION JUDGES—SALARIES.

In addition to eliminating the possibility of Workmen's Compensation Court judges engaging in outside practice, the legisla-

¹⁷ "The state may sue and be sued, and the legislature shall provide by law in what manner and in what courts suits shall be brought." NEB. CONST. art. 5, § 22.

¹⁸ L.B. 155, § 1, 80th Neb. Leg. Sess. (1969).

¹⁹ L.B. 166, *Files of Judiciary Committee*, 80th Neb. Leg. Sess. (1969).

ture by passing L.B. 493 also increased the salaries of these judges from \$16,000 to \$20,000 per year, although it had been suggested in the original bill that their salary should be raised to the level of a district court judge (\$25,000) since the work load of the two types of judges is comparable. The quality of the decisions of the Workmen's Compensation Court is evidenced by the fact that only one decision of that court has been reversed in the last ten years.²⁰

C. L.B. 15—COURT OF INDUSTRIAL RELATIONS.

The most important aspect of L.B. 15 is found in section five, which authorizes public employers to recognize employee organizations, bargain collectively with them, and enter into written agreements with such organizations. Specifically, the section states:

Public employers are hereby empowered to recognize employee organizations for the purpose of negotiating collectively in the determination of, and administration of grievances arising under, the terms and conditions of employment of their public employees as provided in this act, and to negotiate and enter into written agreements with such employee organizations in determining such terms and conditions of employment.²¹

This provision provides the express statutory authority found to be lacking in *International Brotherhood of Electrical Workers v. City of Hastings*.²² In this case the court held:

The generally accepted rule established in other jurisdictions on the issue, which we adopt, is that a public agency or governmental employer has no legal authority to bargain with a labor union in the absence of express statutory authority.²³

It should be noted that L.B. 15 did not repeal section 48-810.01 of the Nebraska statutes which provides that a public employer can not be compelled to enter into an agreement with a labor union. However, this section does not affect the authority of the court to issue a judicial order setting out the items specified in section 48-818 relating to establishing or altering the scale of wages, hours of labor, or conditions of employment.

The Nebraska bill also expands the jurisdiction of the Court of Industrial Relations to include: "All industrial disputes involving governmental service, service of a public utility, or other disputes as the Legislature may provide. . . ."²⁴ Previously the jurisdiction of the court relating to governmental employees was limited

²⁰ L.B. 493, *Files of Judiciary Committee*, 80th Neb. Leg. Sess. (1969).

²¹ L.B. 15, § 5, 80th Neb. Leg. Sess. (1969).

²² 179 Neb. 455, 138 N.W.2d 822 (1965).

²³ *Id.* at 457-58, 138 N.W.2d at 824.

²⁴ L.B. 15, § 3, 80th Neb. Leg. Sess. (1969).

to those cases in which the government was acting in a proprietary capacity. The language of section 48-801 as amended by L.B. 15 brings teachers under the jurisdiction of the Court of Industrial Relations, but section three of L.B. 15 amends section 48-810 to deny the court jurisdiction of any person, organizations, or school districts subject to the provisions of the Nebraska Teachers' Professional Negotiations Act, sections 79-1287 to 79-1295 of the Nebraska statutes, until all provisions of such act have been exhausted without resolution of the dispute involved. However, L.B. 15 did not specifically repeal section 79-1290 which provides that no board of education or school board of any public school district in the state shall be required to meet or confer with representatives of an organization of certificated school employees unless a majority of the members of such board determines to recognize such organizations. This conflict raises some question as to the court's authority in the area.

A third area affected by L.B. 15 is designation of the representative of the employees for collective bargaining purposes. Section five of L.B. 15 amends section 48-816 permitting parties to mutually agree to a secret ballot procedure to determine questions of representation for purposes of collective bargaining, for and on behalf of employees. A significant aspect of this provision is that it does not set out procedures by which the Court of Industrial Relations can determine the bargaining agent of the employees. This will likely result in more problems such as those found in some of the recent decisions of the court. In one recent case²⁵ the employer refused to bargain with an agent other than the organization of which each employee automatically became a member when employed by the public utility. Two other unions claiming to represent some of these same employees were denied recognition. The court declined to compel the employer to bargain with these unions on the ground that an employer does not have to bargain simply because a person or organization claims to represent its employees. While an arrangement whereby an employer automatically makes the employee a member of a specified organization for bargaining purposes is of questionable validity under section seven of L.B. 15,²⁶

²⁵ Public Service Employees Council; General Drivers Union Local No. 554; Public Service Employees Local No. 571; and International Union of Operation Engineers Local No. 38 v. Metropolitan Utilities District of Omaha (Court of Industrial Relations of the State of Nebraska, No. 21, June 21, 1968).

²⁶ L.B. 15, § 4, 80th Neb. Leg. Sess. (1969), provides: "No adverse action by threat or harrassment shall be taken against any employee because of any petition filing by such employee, and the employment status of such employee shall not be altered in any way pending disposition of the petition by the court."

the bill does not resolve the problem of the scope and manner of choosing an appropriate bargaining unit.

Section four of L.B. 15, brought about by the discharge of public employees for union participation, amends section 48-811 of the Nebraska statutes. This amendment provides that an employer shall not discriminate against an employee for filing a petition invoking the jurisdiction of the court and that his employment status cannot be changed while the petition is pending. This provision does not cover an employee's discharge after the disposition of the suit and seems unnecessarily narrow in that it does not provide for protection for employees engaged in other union activities.

L.B. 15 is another step forward in labor relations in the public employment field in Nebraska. First, as pointed out earlier, it expands the jurisdiction of the Court of Industrial Relations. Furthermore, perhaps the most important aspect of the bill is the explicit authorization for public employers to enter into agreements with public employees. This goes one step beyond the present right of public employees to organize. However, because of the vagueness apparent in the bill its effect is questionable in some areas.

III. PUBLIC COUNSEL

A. L.B. 521—OMBUDSMAN.

The approval of L.B. 521 with the emergency clause made Nebraska one of the first states to establish the office of Public Counsel, generally referred to as an Ombudsman. The Nebraska bill is modeled after the Ombudsman system now in operation in Hawaii with certain modifications adopted from a similar bill introduced in the Colorado House of Representatives.²⁷

One of the major purposes of this bill is to create an agency where all members of the public will be able to take their complaints about administrative agencies without being deterred by the seemingly impersonal atmosphere that surrounds many such agencies. As demands for governmental services increase the number of agencies needed to fulfill these demands also increases. The size of governmental agencies, it is contended by some,²⁸ tends to overwhelm members of the public. To those that hold this view, the office of Public Counsel provides the public with one easily identifiable place for the public to take their complaints when they feel they have been unjustly treated by an administrative agency. In this respect it is important to remember that the proponents of

²⁷ L.B. 521, *Files of Judiciary Committee*, 80th Neb. Leg. Sess. (1969).

²⁸ *Id.*

the bill did not intend the office of Public Counsel to be, strictly speaking, a legal counsel.²⁹ This is underscored by the provisions of the bill, which do not require the holder of the office to be an attorney. Instead, the bill provides: "The Public Counsel shall be a person well equipped to analyze problems of law, administration, and public policy"³⁰ The purpose of such an office is envisioned by its supporters as a place where information concerning complaints can be accumulated, sorted, and then the findings reported back to the complaining citizen.³¹ The role of the Public Counsel is not limited to responding to complaints; rather, he is given the power to initiate the investigation of any administrative act or of any administrative agency.³² Furthermore, the bill contains an authorization for the Public Counsel to "publish his conclusions and suggestions by transmitting them to the Governor, the Legislature or any of its committees, the press, and others who may be concerned."³³ Section fourteen provides that no proceeding, opinion, or expression of the Public Counsel shall be reviewable in any court. These provisions give the Public Counsel the power to expose any inequitable dealings of administrative agencies to the public.

In fairness, it must be noted that all complaints from citizens do not arise from arbitrary actions of agencies and in many cases there will be little the Public Counsel can do to resolve a complaint except explain the reasons for the action.³⁴ An example would be a lengthy delay in answering a complaint which is caused by the lack of sufficient funds to hire an adequate staff. While the Public Counsel can express the opinion that such an agency needs more money, the actual appropriation of such funds depends on the legislature.

Another reason for the creation of a "watchdog of administrative agencies" is the hope that a truly objective view of such agencies can be obtained. The office of Public Counsel is envisioned as a way of identifying practices of administrative agencies which are inefficient or outdated but which are continued because there exists no incentive for change. A related problem that can also cause inefficiency is the improper delegation of authority.³⁵ The

²⁹ *Id.*

³⁰ L.B. 521, § 3, 80th Neb. Leg. Sess. (1969).

³¹ L.B. 521, *Files of Judiciary Committee*, 80th Neb. Leg. Sess. (1969).

³² L.B. 521, § 6, 80th Neb. Leg. Sess. (1969).

³³ L.B. 521, § 11, 80th Neb. Leg. Sess. (1969).

³⁴ Gellhorn, *The Ombudsman's Relevance to American Municipal Affairs*, 54 A.B.A.J. 134 (1968) [hereinafter cited as Gellhorn].

³⁵ McClellan, *The Role of the Ombudsman*, 23 U. MIAMI L. REV. 463 (1969).

size of many administrative agencies is so large that no one man can effectively make every decision referred to a specific agency. The role of the Public Counsel in such situations will be to attempt to remedy improper decisions by calling them to the attention of a higher official. Often such officials will quickly straighten out the matter involved since the responsibility for ineptitude in all decisions is generally attributed to the department head.

In the past, legislators have been forced to perform some of the duties they now hope can be handled by the Public Counsel. Specifically, legislators have attempted to solve problems their constituents were having with state agencies by dealing with these agencies directly. The advisability of such a system is attacked on several grounds. First, it is pointed out that such an arrangement involves the possibility that an agency may feel it is under an obligation to accommodate a specific legislator who has supported the agency policies in the past.³⁶ The unfairness that results from basing an agency's decisions on such considerations is not likely to create a favorable impression of governmental agencies in the minds of the public. Furthermore, there is the possibility that personal antagonism would prevent a citizen from freely expressing his complaints to a legislator. Situations such as these should be minimized by L.B. 521. The bill provides that the office of Public Counsel is to be filled by a two-thirds vote of the legislature from nominations submitted by the Executive Board of the legislature³⁷ and the holder of the office must not actively engage in partisan affairs during his term of office.³⁸ Both of these provisions should help maintain the neutrality of the office.

However, the provision that the legislature elect the Public Counsel may make it difficult for the Public Counsel to support truly unpopular causes. Protection of the rights of those with unpopular views might mean that the necessary two-thirds vote for re-election would be unattainable. Another group that should benefit from the bill is the less affluent, who, in many cases, do not have the money to take a grievance to court and are often apprehensive about contacting a legislator personally.³⁹ The Public Counsel should be more accessible to these people. The benefits of freeing the legislators from such activities includes permitting them to devote more of their time to studying new laws and possible remedies for defects in existing statutes.

³⁶ Comment, *An Ombudsman in New York?*, 27 ALBANY L. REV. 84 (1963).

³⁷ L.B. 521, § 2, 80th Neb. Leg. Sess. (1969).

³⁸ L.B. 521, § 3, 80th Neb. Leg. Sess. (1969).

³⁹ Gellhorn, note 34 *supra*, at 138.

The Public Counsel system does not preclude use of remedies available before L.B. 521 was passed. To effectively attain the objectives previously discussed, there must be confidence that any complaints brought to the attention of the Public Counsel will be fairly investigated and a prompt reply given. If an appearance of impartiality is not achieved then it is likely constituents' complaints will still ultimately reach the legislators, who would then be forced to once again assume the role of go-between for the public and the governmental agencies.

One provision of L.B. 521 that might undermine the impartiality of the Public Counsel is section four, which provides for a six year term of office. The advisability of having an elected official serve is sometimes questioned. It is believed that greater independence and impartiality can be obtained by a career official who holds his office subject only to retirement or removal for dereliction of duty.⁴⁰ A final advantage of impartiality is that a citizen who is convinced his complaint has been fairly investigated by a neutral party is more likely to accept an adverse explanation.

No matter how carefully a bill of this type is designed, the Public Counsel is going to cause some resentment among the agencies subjected to investigation. An argument usually advanced by agencies is that having their records subjected to criticism for misconduct and negligence will lower morale and efficiency within the agency.⁴¹ But it is not the purpose of the Public Counsel to criticize state agencies. Such criticism is only incidental to the Public Counsel's main function, which is, to serve as a channel of communication between the public and the various state agencies.

To keep antagonism between the Public Counsel's office and the state agencies at a minimum, section nine provides that before any criticism is directed toward any agency or person the Public Counsel will discuss the problem with that person or agency. Furthermore, section ten provides that if a satisfactory arrangement is not then arrived at, the Public Counsel can request and receive the reasons of the agency for not complying with the Public Counsel's request. These two sections should provide some protection against embarrassment for both the Public Counsel and the state agencies. Section nine will ensure that the agency about to be cri-

⁴⁰ Farley and Farley, *An American Ombudsman: Due Process in the Administrative State*, 36 PENN. B.A.Q. 23, 26 (1964). It might be possible to minimize this problem by a system such as the one provided for state judges in art. V, section 21 of the Nebraska Constitution.

⁴¹ Comment, *An Ombudsman in New York?*, 27 ALBANY L. REV. 84 (1963).

ticized is aware of the fact and has time to change its position if the agency should so desire. Section ten should prevent differences of opinion caused by the failure of the Public Counsel to understand fully the reasons for a specific ruling. Section ten might also prevent the possibility of the Public Counsel being publicly discredited by openly criticizing a public agency or person for actions that later turned out to be justified or explainable.

It should not be expected that establishment of the office of Public Counsel will solve all disputes between individual Nebraskans and state agencies. Many of the complaints received by the Public Counsel will be based on policy considerations over which the Public Counsel has no authority. Another problem is the lack of enforcement powers. Even though the Public Counsel is given power to subpoena records and compel court appearances under section four of the bill, and section fifteen provides a fine for obstructing the Public Counsel in the performance of his duties, the Public Counsel still must rely on public opinion to force the desired changes. The effectiveness of this method of enforcement will in turn depend in large measure on the reputation of the individual holding the office.

B. L.B. 950—PUBLIC DEFENDER.

To comply more efficiently with the decision in *Gideon v. Wainwright*,⁴² holding that the sixth amendment right to counsel was applicable to the states, the last session of the legislature passed L.B. 950. This bill makes it possible for judicial districts to establish the office of public defender. The bill provides that the district judge or judges shall determine when a public defender is needed in their district and this decision shall be certified by the Governor. L.B. 950 provides three standards to be used in determining when the office of public defender should be established. The first is the number of persons in the district who have been provided with counsel in the previous year. The second is the number of attorneys in a district available to represent defendants on an assigned counsel basis. The final consideration is the cost of providing a public defender as compared to the cost of the assigned counsel system.⁴³

The adoption of the public defender system was prompted by the increasing cost of the assigned counsel system. For example, in the sixteenth judicial district, there were thirty-four appointments under the assigned counsel system at a cost of \$4,000 in 1965.

⁴² 372 U.S. 335 (1963).

⁴³ L.B. 950, § 2, 80th Neb. Leg. Sess. (1969).

In 1968 this had risen to fifty-three appointments at a cost of \$11,355.43.⁴⁴ The cost advantage of the two systems is strongly debated. However, one study shows the cost of the assigned counsel system exceeds the cost of the public defender system where the population of the unit is over 400,000.⁴⁵ A further financial aspect of the bill is the effect of section three which transfers the cost of the burden of supplying counsel to those unable to obtain counsel from the counties to the state.

There are a number of problems generally associated with public defender bills which the legislature has attempted to avoid in L.B. 950. First, a troublesome question is at what stage in the proceedings a defendant is entitled to counsel. This question has been posed by the rapidly changing standards imposed on states by Supreme Court decisions such as *Escobedo*⁴⁶ and *Miranda*.⁴⁷ Section eight of the bill provides that any person "entitled by law" to representation by counsel may request the services of the public defender. This provision should be sufficiently flexible to allow for any future decisions extending the right to counsel as long as such decisions are prospective in nature.

Another problem sidestepped by this bill is the level of financial need that must be shown to entitle an accused to the services of the public defender. Section eight provides that a person entitled by law to representation may be required to make a financial statement under oath. A provision such as this may create problems. For instance, what of the individual who is unable to obtain counsel because he is charged with a crime which has aroused a great deal of unfavorable public opinion? Similarly the bill does not provide for those cases in which a defendant has some funds but not enough to pay for an attorney in his particular case. The result of the lack of any standard could be a disparity of requirements in different districts.

While there are conflicting opinions as to the relative merits of the public defender system and the assigned counsel system, the public defender does seem to have a number of advantages over assigned counsel. One major advantage where the system is adopted will be to relieve members of the Bar from bearing a great part of the financial burden of providing counsel for those unable to provide their own. Furthermore, the public defender will be able to specialize in criminal cases. This should eliminate the burden placed on an assigned attorney who handles few or no crimina^l

⁴⁴ L.B. 950, *Files of Judiciary Committee*, 80th Neb. Leg. Sess. (1969).

⁴⁵ L. SILVERSTEIN, *DEFENSE OF THE POOR* 28 (1965).

⁴⁶ *Escobedo v. Illinois*, 378 U.S. 478 (1963).

⁴⁷ *Miranda v. Arizona*, 354 U.S. 486 (1966).

cases to familiarize himself with aspects of criminal law not generally used by him. In addition, the assigned counsel had to exercise caution to avoid a charge by the defendant that he was not given effective assistance of counsel.⁴⁸

The major argument against such a system is failure to provide an independent counsel. It is clear that representatives of the state are presenting both sides of the case; but even so, there does not seem to be any conclusive evidence that such an arrangement results in less effective representation for the defendant.⁴⁹

Section five of the bill provides that all Nebraska public defenders will be popularly elected for a term of four years. This method is criticized because it has a tendency to create instability among the personnel in the office.⁵⁰ In addition, it is claimed that there is a temptation to gain popular support by giving informal advice to people not entitled to the assistance of the public defender.

The public defender system provides an alternative to the present system of assigned counsel; its effectiveness will only be shown as judicial districts implement the provisions of the bill.

IV. L.B. 330—PROFESSIONAL CORPORATIONS

Nebraska finally has a professional corporation act. With the passage of L.B. 330, Nebraska has joined thirty-six states in allowing professional people to incorporate with the purpose of making available all the benefits otherwise available by way of incorporation.⁵¹

For some, the potential benefits would seem to call for immediate establishment of such a corporation. But in view of the Treasury's long hostility to such organizations, despite a long line of defeats involving litigation over professional service organizations, many may be hesitant in joining any rush towards incorporation.

The problem involving professional service organizations and the Treasury's opposition to treating them as corporations, arose through historical development. It can only be understood, therefore, through a brief study of its development.⁵²

⁴⁸ L.B. 950, *Files of Judiciary Committee*, 80th Neb. Leg. Sess. (1969).

⁴⁹ SILVERSTEIN, note 45 *supra* at 50-53.

⁵⁰ Symposium of Legal Aid, part 3, *The Public Defender*, 30 SASK. B. REV. 110 (1965).

⁵¹ L.B. 330, *Files of Judiciary Committee*, 80th Neb. Leg. Sess. (1969).

⁵² For a biographical list of some literature on professional corporations see Scallen, *Taxation of Professionals*, 49 MINN. L. REV. 603, 605 n.6 (1965) [hereinafter cited as Scallen].

The question whether an organization is a corporation for tax purposes stems from uncertain definitions of "corporation" by the Treasury, dating back to 1926.⁵³ Starting in at least 1914, the definition of a corporation always included "association," but never "general partnerships."⁵⁴ It was here also, that the idea that state law was not determinative of an organization's tax status, first emerged.⁵⁵ For almost fifty years the Treasury's practice was to classify as many organizations as possible as associations (that is, corporations) for federal taxation purposes, even though under state law, they may have been partnerships. The Treasury looked at the form of the organization and if it possessed enough of the characteristics of a corporation (limited liability, continuity of life, centralized management, free transferability of interest, etc.) it was taxed as such.⁵⁶ This became known as the "resemblance test." The purpose of this practice was probably to collect a "double tax" on these organizations.⁵⁷

In 1935, the Supreme Court decided the case of *Morrissey v. Commissioner*,⁵⁸ the leading case for the "resemblance" doctrine. The Court, holding an unincorporated organization was to be taxed as a corporation, enumerated the four above mentioned characteristics, and continuity of holding title to property as relevant in determining an organization's status. This decision encouraged the Internal Revenue Service to continue classifying all borderline organizations as associations. And in 1936, it issued orders to use the resemblance test on a nationwide basis.⁵⁹

Also in that year, the Treasury, arguing in favor of corporate treatment for a medical clinic organized as a trust, won the case of *Pelton v. Commissioner*.⁶⁰ The Seventh Circuit Court of Appeals applied the "resemblance" test of *Morrissey* and held that it should be classified as a corporation. Thus, despite the fact that the trustees were the beneficiaries, they probably did not have limited liability, and corporations could not practice law in the state. The Treasury now finds this case embarrassing.⁶¹

⁵³ "The term 'corporation' includes associations, joint-stock companies, and insurance companies." INT. REV. CODE OF 1954, § 7701(a) (3).

⁵⁴ Eaton, *Professional Corporations and Associations in Perspective*, 23 TAX L. REV. 1, 3 (1967) [hereinafter cited as Eaton].

⁵⁵ *Id.* at 3.

⁵⁶ *Id.* at 3-4.

⁵⁷ Scallen, note 52 *supra*, at 604.

⁵⁸ 296 U.S. 344 (1935).

⁵⁹ Eaton, note 54 *supra*, at 4-5.

⁶⁰ 82 F.2d 473 (7th Cir. 1936).

⁶¹ Eaton, note 54 *supra*, at 5.

During this period of time and the post-war years, important changes were taking place in certain professions. Groups of doctors, especially in the midwest had begun practicing in large groups, rather than alone or with a small number of partners. These groups did possess certain corporate characteristics and the Treasury was successful in treating them as such.⁶²

Since they were being taxed as corporations, these groups eventually began to seek treatment as corporations to take advantage of pension and profit sharing plans. Also with the introduction of steeply progressive income tax rates it was advantageous to do so.⁶³

Suddenly the Treasury changed its position, apparently to prevent the further spread of pension and profit-sharing plans.⁶⁴ In *United States v. Kintner*,⁶⁵ the Treasury opposed corporate treatment for a Montana medical clinic and urged that state laws should be dispositive of an organizations status. However, the court felt that federal standards should apply to achieve uniformity in the income tax law, and since the professional service organization possessed more corporate than non-corporate characteristics they should be granted corporation status.⁶⁶

In response to this holding the Treasury promulgated the "Kintner regulations,"⁶⁷ in 1960, which provided that federal standards must be met for corporate status; however, state law would determine whether the organization did possess corporate characteristics. At the time this seemed like a safe move for the Treasury to make since few states allowed professional service organizations to form anything but a partnership.⁶⁸

This, of course, "backfired" on the Treasury. The emphasis on local law was an invitation to pass enabling legislation by the states, granting these groups enough corporate characteristics to qualify as a corporation.

Therefore, in 1965, the Treasury again issued new regulations, aimed specifically at professional service organizations.⁶⁹ Under these new regulations, local law was still determinative of cor-

⁶² *Id.* at 6.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ 216 F.2d 418 (9th Cir. 1954).

⁶⁶ Comment, *Tax Relief for Professional Service Organizations*, 73 DICK. L. REV. 486, 487 (1969) [hereinafter cited as 73 DICK. L. REV.].

⁶⁷ *Id.* 489 n.25, citing, Treas. Reg. § 301.7701-2 T.D. 6503, 1960-2 CUM. BULL. 409.

⁶⁸ *Id.* at 489.

⁶⁹ 73 DICK. L. REV., note 66 *supra*, at 489, citing, Treas. Reg. § 301.7701-2(a) (1965).

porate characteristics, but an organization had to have a majority of the characteristics to get corporate tax treatment.⁷⁰ The characteristics are: (1) associates, (2) an objective to carry on business, (3) continuity of life, (4) centralized management, (5) limited liability, and (6) free transferability of interests.⁷¹ However, the first two apply to partnerships as well as corporations and therefore the last four are determinative. The regulations review the last four characteristics and attempt to show that a professional service organization does not possess them.⁷²

The 1965 regulations have not been successful for the Treasury. In the first case tried under the regulations, *Empey v. United States*,⁷³ they were held to be invalid. *Empey* involved a group of lawyers incorporated under Colorado law who paid income tax as a partnership and sued for a refund claiming corporate status. The court said that the 1965 regulations were an attempt to tax a corporate entity as a partnership which was inconsistent with the Internal Revenue Code and the judicial interpretation thereof.⁷⁴ In a line of decisions since *Empey* other courts have reached the same conclusion.⁷⁵

But this may not end the Treasury's attack on professional service organizations. The recently passed Tax Reform Act of 1969 restricts contributions to pension and profit sharing plans by small business corporations electing under Subchapter S. Any amount paid into such a plan, for an employee owning more than five percent of the stock, in excess of the lesser of ten percent of his salary, or \$2,500, will be taxed to the employee-stockholder as ordinary income.⁷⁶

But this question still remains unanswered: what are the advantages of incorporation for the professional person? The question implies a comparison with non-corporate practice.

With the adoption of qualified pension and profit-sharing plans,⁷⁷ a professional corporation may place a maximum of twenty-five

⁷⁰ Malone, *Professional Corporations—A Current Appraisal*, 23 ARK. L. REV. 215, 231, citing, Treas. Reg. § 301.7701-2(a) (3) (1965) [hereinafter cited as Malone].

⁷¹ *Id.* at 232, citing, Treas. Reg. § 301.7701-2(h) (2)-(5) (1965).

⁷² *Id.*

⁷³ 272 F. Supp. 851 (D. Colo. 1967), *aff'd*, 406 F.2d 157 (10th Cir. 1969).

⁷⁴ *Id.* at 853.

⁷⁵ These include an 8th circuit case, *Wallace v. United States*, 294 F. Supp. 1225 (E.D. Ark. 1968).

⁷⁶ Tax Reform Act of 1969, § 531.

⁷⁷ INT. REV. CODE of 1954, § 401. For a good discussion of retirement plans for partnerships under the Keogh Plan see Hazlehurst, *Retirement Plans for Partnerships*, 9 LAW OFFICE ECON. & MANAGE. 265 (1968).

percent of the compensation paid an employee into a trust fund for his benefit, and still deduct it as part of the employee's salary.⁷⁸ However, payments to the fund are not taxed to the employee⁷⁹ and no tax liability occurs until the fund is actually distributed to him,⁸⁰ or until he has a right to the funds.⁸¹ Therefore, at retirement the employee can withdraw the funds taking advantage of a presumably lower tax rate and double personal exemptions.⁸² Also the first \$5,000 of the fund which is distributed is not taxed, to the beneficiary or estate of the deceased employee,⁸³ and certain lump sum distributions will receive long term capital gains treatment if made within one year.⁸⁴ The tax savings can obviously be significant. It has been estimated that a professional person over a thirty-year period, making \$50,000 annually, could accumulate \$593,000 through a qualified plan as compared to \$191,000 without such a plan, a difference of \$402,000. An employee-owner earning \$24,000 can set aside \$6,000 yearly without incurring tax liability, thus saving him approximately \$3,000 in federal income tax and \$300 in state income taxes annually, assuming a fifty percent tax bracket.⁸⁵

Qualified profit-sharing and pension plans also receive favorable federal estate and gift tax treatment. If the employee dies without having drawn on the fund, payments to the beneficiary of the employee are usually not included in the decedent's gross estate,⁸⁶ and the appointment of a beneficiary to receive payments is not considered a transfer by the employee for federal gift tax purposes.⁸⁷

Upon the death of the employee the corporation can pay up to \$5,000 to the decedent's estate or to his beneficiary as a death benefit. The beneficiary of the payment receives it tax free.⁸⁸ Obviously such a tax "break" is unavailable to a non-corporate practitioner.

The corporation may purchase insurance policies for health and hospitalization costs incurred by the employee and his family, or may pay the cost directly to the employee. Either is deductible

⁷⁸ INT. REV. CODE of 1954, § 404(a).

⁷⁹ *Id.* § 402(a)(1).

⁸⁰ *Id.* § 402(a).

⁸¹ *Id.* § 403(a)(1).

⁸² 73 DICK. L. REV., note 66 *supra*, at 487.

⁸³ INT. REV. CODE of 1954, § 101(b).

⁸⁴ *Id.* § 402(a)(2).

⁸⁵ Both examples taken from remarks of Senator Whitney, Floor Debate on L.B. 330, 80th Neb. Leg. Sess. (May 13, 1969).

⁸⁶ INT. REV. CODE of 1954, § 2039(c).

⁸⁷ *Id.* § 2517.

⁸⁸ *Id.* § 101(b)(2).

by the corporation,⁸⁹ and amounts received by the employee are not taxed to him.⁹⁰ The sole proprietor or the partnership does not have this advantage. Only that amount of medical expenses exceeding three percent of his adjusted gross income can be deducted.⁹¹ A well-paid person may, therefore, not often qualify for substantial deduction. But the owner-employee of a professional corporation may fully deduct his medical expenses.⁹²

A professional corporation may also deduct the cost of group life insurance premiums as an expense.⁹³ The employee incurs no taxable income as long as the coverage is less than \$50,000.⁹⁴ As with health and accident insurance, life insurance premiums constitute personal expenses and are not deductible by a non-corporate practitioner.

The taxable year for the partnership must be the same as that of the partners, unless formed prior to 1954, but a corporation when formed has the opportunity to select whatever taxable year it desires.⁹⁵ Under certain circumstances it may be possible to get a "one-time" tax savings by postponing the tax on one year's income and thereby taking advantage of income averaging. Much depends on the circumstances, including the individual's willingness to receive his salary once a year, but the possibility does exist for substantial tax savings.⁹⁶

Incorporation also helps to facilitate estate planning through transferability of interest⁹⁷ and continuity of life. Ownership interests simplify the transfer and valuation of such interests upon death. The interest of the deceased owner can be disposed of under a cross purchase agreement through a stock redemption, or by sale to another.⁹⁸ This, of course, is not possible in a partnership, since death of a partner causes dissolution and often a decrease in the value of the practice.⁹⁹

⁸⁹ Malone, note 70 *supra*, at 218, *citing*, INT. REV. CODE of 1954, § 161.

⁹⁰ INT. REV. CODE of 1954, §§ 105, 106.

⁹¹ *Id.* § 213.

⁹² Malone, note 70 *supra*, at 218.

⁹³ *Id.* at 217, *citing*, INT. REV. CODE of 1954, § 161.

⁹⁴ INT. REV. CODE of 1954, § 79.

⁹⁵ *Id.* § 441.

⁹⁶ Malone, note 70 *supra*, at 220.

⁹⁷ L.B. 330, § 8, 80th Neb. Leg. Sess. (1965), provides that shares may only be transferred to persons who are licensed to practice the profession for which the corporation was organized. *Id.* § 8(2)(1) provides that the care and treatment of humans shall be considered one profession for the purposes of this bill.

⁹⁸ *Id.* § 12 requires the by-laws or charter to provide for the redemption or purchase of the deceased shareholder's stock.

⁹⁹ Malone, note 70 *supra*, at 221.

If the corporate tax rate is lower than the rate of the individual, then retention of earnings can be a tax advantage. The lower corporate rate allows the corporation to build up capital at a lower cost than if the earnings were taxed to the individual.¹⁰⁰ However, excessive retained earnings may subject the corporation to a penalty tax,¹⁰¹ although nearly every corporation can retain up to \$100,000 without a penalty being incurred.¹⁰²

There are other advantages to a professional corporation. Continuity of life and transferability of shares help to attract good associates,¹⁰³ as well as facilitate estate planning.

Limited liability is, of course, important. As damage awards increase and liability insurance becomes more expensive, the lawyer, the doctor, and other professional people "are becoming increasingly concerned with the possibility of complete financial ruin because of the negligence of a co-partner."¹⁰⁴ Naturally the liability between the professional and the person for whom the services are rendered cannot be affected, and L.B. 330 explicitly so provides. Any person is personally and fully liable for misconduct committed by him or by any person under his direct supervision and control. The corporation is liable "up to the full value of its property for any negligent or wrongful acts or misconduct committed by any of its officers, agents or employees while they are engaged on behalf of the corporation."¹⁰⁵

Centralization of management is often mentioned as one of the advantages of incorporation. As a practical matter with respect to making business decisions, however, a small incorporated organization may be no different than a small unincorporated organization. Even in large unincorporated organizations there is generally a business manager or executive committee who may function as a board of directors.

¹⁰⁰ *Id.* at 222.

¹⁰¹ *Id.* at 222, citing, Treas. Reg. §§ 1.535-3(b)(ii)(2) (1959), as amended, T.D. 6992, 1969 INT. REV. BULL. No. 10, at 7; 1.537-2 (1959).

¹⁰² Malone, note 70 *supra*, at 222, citing, INT. REV. CODE of 1954, § 535(c).

¹⁰³ Glock and Dell, *Should a Professional Incorporate?—Kinter Organizations in 1969*, 40 PENN. B.A.Q. 535, 536 (1969) [hereinafter cited as Glock].

¹⁰⁴ Rodney, *Professional Corporations*, 7 ALBERTA L. REV. 205 (1969).

¹⁰⁵ L.B. 330, § 10, 80th Neb. Leg. Sess. (1969). The personal liability of the individual lawyer rendering the service must be maintained, and restrictions on the liability of the other members of the firm must be made apparent to the client through the use of a firm name indicating the fact of incorporation. A.B.A. Committee of Professional Ethics, *Opinion* 303, 48 A.B.A.J. 159 (1962).

But aside from these factors there are disadvantages and *caveats* to be observed before reaching a decision on the desirability of incorporation. Depending on the size of the organization, workmen's compensation and unemployment compensation taxes will have to be paid.¹⁰⁶ Presumably this would apply both to secretarial and professional employees. Also social security taxes for the professional will be slightly higher than the self-employment tax, but the employer's portion of his social security taxes will be deductible by the corporation.¹⁰⁷

"Double taxation" of earnings, to the corporation as profits and either to the shareholder as dividends or the employee as salaries, is one problem to be considered. One answer would be to pay most of the profits out as bonuses or salaries; however, this raises the possibility of an objection by the Internal Revenue Service that the salary is "unreasonable."¹⁰⁸ Another alternative in a corporation with ten or fewer stockholders would be to make an election under Subchapter S to be taxed as a partnership, if all stockholders concur.¹⁰⁹

A professional corporation may be subject to a penalty tax of seventy percent on retained earnings if the corporation falls within the definition of a personal holding company.¹¹⁰ Personal holding company income includes amounts received under personal service contracts with employees owning twenty-five percent or more of the stock of the corporation.¹¹¹ It may be possible to allocate income to other employees but the Treasury may oppose this move. It has announced that examination of professional service corporation returns will include a determination of whether the Treasury should exercise its right to allocate income or deduction to prevent evasion of taxes, in order to clearly reflect income.¹¹² Of course, one possibility would be to pay out all earnings as salaries so no penalty tax could be imposed, but as mentioned above, large salaries may invite opposition from the Treasury.

Upon incorporation the professional service corporation may have to pay a tax on unrealized receivables which it acquired from

¹⁰⁶ Glock, note 103 *supra*, at 538.

¹⁰⁷ *Id.* at 539.

¹⁰⁸ INT. REV. CODE of 1954, § 162(a)(1).

¹⁰⁹ *Id.* § 1371(a). Any election would be deterred by the restrictions put on contributions to qualified pension and profit-sharing plans by an electing small business corporation. See text accompanying note 76 *supra*.

¹¹⁰ Malone, note 70 *supra*, at 224, *citing*, INT. REV. CODE of 1954, § 542(a).

¹¹¹ Malone, note 70 *supra*, at 224, *citing*, INT. REV. CODE of 1954, § 543(a)(7).

¹¹² *Id.*

the partnership, if the partnership was on a cash basis. Therefore, it may be desirable to keep the partnership alive until all the receivables are collected or make a non-taxable exchange,¹¹³ with the tax falling on the corporation when the receivables are collected.¹¹⁴

Accounts payable transferred from the partnership to the newly formed corporation are not deductible when paid¹¹⁵ and the partnership cannot deduct the payment by the corporation.¹¹⁶ It has been suggested that the cash basis partnership should retain the accounts payable and pay them.¹¹⁷

These are just some of the problems involved. The decision of whether to incorporate¹¹⁸ must involve a view of the Treasury's likely position in the future. Although it seems that the "battle" is over, the long history of opposition to professional service organizations and restrictions on Subchapter S elections in the Tax Reform Act of 1969 indicates that the Treasury may attempt more restrictive legislation, at some later date. Whatever the decision, prior planning is in order at this time should the issue eventually be resolved in the taxpayer's favor.¹¹⁹

V. POST-CONVICTION

A. L.B. 908—CIVIL RIGHTS RESTORED AND EXPUNGEMENT OF CONVICTION.

Section one of L.B. 908 provides for the restoration of civil rights for a convicted felon who has been placed on probation and has fulfilled the conditions thereof.

Due to an unfortunate omission in the statutes, a person who is placed on probation for committing a felony cannot have his full civil liberties restored. If the same person was convicted and sent to a penal institution, his civil liberties can be restored.¹²⁰

¹¹³ INT. REV. CODE of 1954, § 351.

¹¹⁴ Malone, note 70 *supra*, at 225.

¹¹⁵ Holdcroft Transp. Co. v. Comm'r, 153 F.2d 323 (8th Cir. 1946).

¹¹⁶ Doggett v. Comm'r, 275 F.2d 823 (4th Cir. 1960).

¹¹⁷ Malone, note 70 *supra*, at 226.

¹¹⁸ L.B. 330 provides that it shall apply to attorneys only to the extent and under the conditions that the Supreme Court of Nebraska shall determine. L.B. 330, § 20, 80th Neb. Leg. Sess. (1969). For a discussion of formation of professional corporations without prior court authorization see Annot., 4 A.L.R.3d 383, 388 (1965). Although the bill specifically names certified public accountants, Op. No. 82, OPS. ATTY. GEN. NEB., (Oct. 23, 1969), states that a certified public accountant or group of public accountants may not form a professional corporation to perform accounting service.

¹¹⁹ Malone, note 70 *supra*, at 235.

¹²⁰ L.B. 908, *Files of Judiciary Committee*, 80th Neb. Leg. Sess. (Mar. 28, 1969).

"Civil rights" as referred to in section one means, at least, the right to vote,¹²¹ the right to hold public office,¹²² and probably the right to serve on juries and as an elector.¹²³ But the term has never been adequately defined in Nebraska. It would seem that the legislature should have alleviated this problem since this is the very area with which section one of L.B. 908 is involved.

The need for L.B. 908 arose because the position of those who have been put on probation has never been clear. The Board of Pardons has refused to act in this area on the theory that probation is not "conviction."¹²⁴ For those who have been incarcerated or paroled, upon fulfilling the requirements of his sentence or parole, the Board of Parole issues a certificate of discharge which restores the person's civil rights.¹²⁵

Section two of L.B. 908 is distinct from section one. It provides that upon fulfilling the requirements of probation, the offender may petition the sentencing court to set aside the conviction for the purpose of removing all civil disabilities.¹²⁶ In determining whether to do so the court is instructed to consider: (1) the behavior of the offender while on probation; (2) the likelihood of further criminal activity; and (3) any other relevant information.¹²⁷ If the court determines that it is in the best interests of the public and the offender to do so it may issue such order.

The purpose of section two is to relieve a person who has fulfilled the terms of his probation of the disqualifications and disabilities, which he is under, other than "civil rights." This section removes one of the bases for denying the offender a license to practice certain professions. Conviction for a felony is the basis for denying a license for the practice of medicine and surgery,¹²⁸ nursing,¹²⁹

¹²¹ The right to vote is denied a convicted felon by the state constitution. NEB. CONST. art. VI, § 2.

¹²² The right to hold public office is also denied by the state constitution. NEB. CONST. art. XV, § 2.

¹²³ The right to serve on juries and to serve as an elector is denied by statute. NEB. REV. STAT. § 29-112 (Reissue 1964).

¹²⁴ Remarks of Attorney General Meyer, L.B. 908, *Files of Judiciary Committee*, 80th Neb. Leg. Sess. (Mar. 28, 1969). This bill does not help in defining "conviction" for other purposes.

¹²⁵ L.B. 1307, § 49(4), 80th Neb. Leg. Sess. (1969).

¹²⁶ L.B. 908, §§ 2(1), 3(2), 80th Neb. Leg. Sess. (1969). L.B. 1307, § 60(2) allows the Board of Pardons to empower the Governor to authorize a pardoned felon to possess a firearm in commerce. This disability is imposed by federal law.

¹²⁷ L.B. 908, § 2(2), 80th Neb. Leg. Sess. (1969).

¹²⁸ NEB. REV. STAT. §§ 71-102 to -104, -147(4) (Reissue 1966).

¹²⁹ NEB. REV. STAT. § 71-1,132.29 (Reissue 1966).

barbering,¹³⁰ cosmetology,¹³¹ and massage.¹³² Conviction for a felony is not only grounds for refusing a license as a private detective, but the license is affirmatively denied, providing a full pardon has not been issued.¹³³ Therefore, the licensing agency must grant a license if no other grounds for denial can be shown.¹³⁴

However, section two also provides that setting aside of the conviction shall not: (1) require reinstatement of any employment or position; (2) preclude proof of a plea of guilty when relevant to the determination of an issue involving the rights or liabilities of someone else; (3) preclude proof of the condition as evidence of the commission when the fact of commission is relevant for the purpose of impeaching the offender as a witness except that the order setting aside the conviction may be introduced in evidence; or (4) preclude use of the conviction for the purpose of showing recidivism.¹³⁵

With these broad exceptions the question arises whether L.B. 908 is really effective in removing civil disabilities and disqualifications, arising from conviction. What effect will section two have on discrimination against past offenders by private employers? Certainly it does not, by its express terms, provide that such an employer cannot deny employment on this basis. Another question may concern the relationship between section two and municipal ordinances where conviction for a felony may be the basis for denying a license.

If the object of the bill is to remove the disabilities arising from convictions then its usefulness is substantially reduced by these broad exceptions. L.B. 1379¹³⁶ is an interesting contrast to section two of L.B. 908. It provides that when a minor has been adjudged delinquent or in need of supervision, and has completed his program, any interested person may request the court to set aside the adjudication. After a hearing the court may issue an order setting aside the adjudication. When such order is made the order shall also require that all records concerning the adjudication be sealed. These records may then only be made available upon a court order for good cause shown. Certainly minors stand in a different posi-

¹³⁰ NEB. REV. STAT. § 71-217 (Reissue 1966).

¹³¹ NEB. REV. STAT. § 71-331 (Reissue 1966).

¹³² NEB. REV. STAT. § 71-2717 (Reissue 1966).

¹³³ NEB. REV. STAT. § 71-3206 (Reissue 1966). This is, of course, not a complete listing.

¹³⁴ The rulings of state agencies are reviewable by the courts. NEB. REV. STAT. §§ 84-917 to -919 (Reissue 1966).

¹³⁵ L.B. 908, § 4, 80th Neb. Leg. Sess. (1969). MODEL PENAL CODE § 301.5 (Tent. Draft No. 2, 1954) explains the reasons for these exceptions.

¹³⁶ 80th Neb. Leg. Sess. (1969).

tion than adult felons on probation, but nevertheless, it would seem that something nearer the provisions of L.B. 1379 would be more in line with the policy and purposes of section two of L.B. 908.

L.B. 908 is retroactive, but it will not be available to any offender who has been convicted of a felony within ten years prior to the date of the conviction requested to be set aside.¹³⁷

B. L.B. 444—EXECUTION OF JUVENILE COURT ORDERS WHILE ON APPEAL

The legislature also performed a "filling-in" function with the passage of L.B. 444.¹³⁸ The bill provides that an appeal from a juvenile court order to the district court shall not stay the execution of the juvenile court order.

By prior law, the juvenile court lost control of the particular child during the time between filing of notice of appeal from the juvenile court to the district court and final settlement therein. Too often during this interim the individual was allowed to run freely, and he frequently got into more trouble.¹³⁹ Under L.B. 444, the order of the juvenile court will stay in effect during the appeal.

Some states give jurisdiction over the case to the court to which the appeal is taken,¹⁴⁰ but the approach taken by Nebraska seems to be the most common.¹⁴¹ By comparison, when on appeal from district court to the Supreme Court of Nebraska, the supreme court has jurisdiction over the case while awaiting the outcome, and the supreme court can order suspension of the sentence during the appeal.¹⁴²

VI. TAXES

A. L.B. 1415—BONDS REQUIRED FOR NON-RESIDENT CONTRACTORS.

L.B. 1415 is directed at assuring that the state receives taxes due from non-resident contractors.

The bill provides that non-resident contractors, who desire to do business in Nebraska, must register and file a bond with the

¹³⁷ L.B. 908, § 6, 80th Neb. Leg. Sess. (1969).

¹³⁸ L.B. 444 *amends* NEB. REV. STAT. § 43-202 (Reissue 1968).

¹³⁹ Remarks of Senator Carstens, Floor Debate on L.B. 444, 80th Neb. Leg. Sess. (Mar. 6, 1969).

¹⁴⁰ MASS. ANN. LAWS ch. 119, § 56 (1965).

¹⁴¹ MICH. COMP. LAWS ANN. § 712A.22 (1968); MINN. STAT. ANN. § 260.291 (Supp. 1969).

¹⁴² NEB. REV. STAT. § 25-1914 (Reissue 1964). *See also* NEB. REV. STAT. § 29-2306 (Reissue 1964).

Tax Commissioner.¹⁴³ A bond of not less than \$5,000 must be filed with each contract. However, the Tax Commissioner may at his discretion allow the execution and filing of one bond for all contracts required to be registered.

A contractor is defined as an individual, firm, partnership, corporation or association of persons engaged in the construction, repair, demolition, etc., of buildings, roads, sewers, gas and water mains, levees, dams, airports and "every other type of structure project, development or improvement coming within the definition of real and personal property...."¹⁴⁴ The bill defines a non-resident contractor as one who is neither domiciled in Nebraska, nor maintains a permanent place of business in Nebraska, or if so domiciled, spends less than six months a year in the state.¹⁴⁵

Failure to comply with the provisions of the bill involves several different liabilities and disabilities. The filing of the bonds are a condition precedent to commencing work on the contract. But if work should be commenced, the Attorney General of Nebraska, or the county attorney of the county in which the contract is to be performed is permitted to proceed by injunction to prevent performance until there is compliance. Also, any person who fails to comply is guilty of a misdemeanor, and each day of activity upon the contract is a separate offense.¹⁴⁶ The penalty provided is a \$1,000 maximum fine, six months imprisonment, or both.

This recurring penalty clause is important. It is usually declared that where the penalty is recurring the contract is void, as being against public policy, that is, the requirement is for the protection of the public. Thus a non-complying contractor cannot enforce a contract made without compliance. But, where the penalty is imposed only once, then the contract is enforceable. This is the usual situation where the requirement is a revenue measure.¹⁴⁷

Although this bill is for security and collection of revenue, it specifically provides that any contractor who fails to comply with the act "shall not be entitled to maintain an action to recover pay-

¹⁴³ Registration, licensing and/or bonding of contractors is a widely followed practice. See CAL. BUS. & PROF. CODE § 7000 *et seq.* (West Supp. 1964); N.C. GEN. STAT. § 87-14 (1965); WASH. REV. CODE ANN. § 18.27 *et seq.* (Supp. 1968); WIS. STAT. ANN. § 71-10(14) (a) (1969).

¹⁴⁴ L.B. 1415, § 1(1), 80th Neb. Leg. Sess. (1969).

¹⁴⁵ L.B. 1415, § 2, 80th Neb. Leg. Sess. (1969).

¹⁴⁶ L.B. 1415, § 10, 80th Neb. Leg. Sess. (1969).

¹⁴⁷ See Annot., 30 A.L.R. 835, 836 (1924); Annot., 42 A.L.R. 1226 (1926); Annot., 118 A.L.R. 646 (1939); Annot., 118 A.L.R. 676 (1939); Casenote, 23 S. CAL. L. REV. 98 (1949). Compare WASH. REV. CODE ANN. § 18.27.040 (Supp. 1968) with L.B. 1415. The Washington statute was upheld and discussed in *Treffry v. Taylor*, 67 Wash. 2d 487, 408 P.2d 269 (1965).

ment for performance in the courts of this state on such contract."¹⁴⁸ Therefore, it appears that non-compliance with the statute would be a very tenable defense to an action for payment by a non-resident contractor since this concept is also consistent with the same implication from the recurring penalties clause.

The Supreme Court of California, in an opinion by Justice Traynor, has held that a contractor cannot recover compensation under the contract if he had not complied with the requirements of the law regardless of the harshness of the rule, or unjust enrichment.¹⁴⁹ The California statute¹⁵⁰ in question required the licensing of California contractors and was designed for the protection of the public. It required a contractor to allege and prove, upon an action to recover under a contract, that at all times during performance he was licensed.

The question may arise whether a non-resident contractor may sue for anticipatory breach, since L.B. 1415 only provides that the contractor cannot recover payment for performance. In *Brunzell Construction Co., Inc., of Nevada v. Barton Development Co.*,¹⁵¹ a California Court of Appeals said that to hold for the plaintiff-contractor "would lead to the odd rule that one who could not recover for full performance of a contract could nevertheless recover for not performing it at all." But, it may be possible for a contractor to recover in *tort*, the proof of the contract going to show the circumstances under which the plaintiff's services were rendered and his money expended.¹⁵²

The bill may also have the effect of putting non-resident contractors on a more even footing with resident contractors in bidding on jobs. Formerly if a non-resident contractor could escape paying the taxes due, then presumably his bid would have been reduced by that amount of taxes, making it more likely that the non-resident contractor would have his bid accepted.

¹⁴⁸ L.B. 1415, § 9, 80th Neb. Leg. Sess. (1969).

¹⁴⁹ *Lewis & Queen v. N.M. Ball Sons*, 48 Cal. 2d 141, 308 P.2d 713 (1957); accord, *Bryan Builders Supply v. Midyette*, 274 N.C. 264, 270, 162 S.E.2d 507, 511 (1968), where the court said that the contract made without compliance does not make the contract totally without effect. The owner may sue for breach.

¹⁵⁰ CAL. BUS. & PROF. CODE § 7000 *et seq.* (West Supp. 1964).

¹⁵¹ 240 Cal. App. 2d 442, 444, 49 Cal. Rptr. 667, 668 (1966). This suit involved a contract price of \$1,450,000.

¹⁵² *Grant v. Weatherolt*, 123 Cal. App. 2d 34, 266 P.2d 185 (1954). See also *Proffitt & Durnell Plumbing, Inc. v. David H. Baer Co.*, 247 Cal. App. 2d 518, 55 Cal. Rptr. 764 (1966).

L.B. 1415 also provides that any contractor who contracts with a subcontractor subject to the act must withhold enough money on the contract with the sub-contractor to guarantee that all taxes due because of the contract be paid. Failure to comply will make the general contractor liable and the Tax Commissioner is empowered to go against such contractor as though the services had been rendered directly by him. Also, the assignee of a contract subject to L.B. 1415 takes the contract with the same limitations and prohibitions as the assignor.

B. STATE PRIORITY IN THE COLLECTION OF TAXES.

1. *L.B. 1359—Sales taxes collected constitute a trust fund in the hands of the retailer.*

L.B. 1359 amends section 77-2712 of the Nebraska statutes. It provides that funds collected by the retailer become a trust fund held by the retailer for the state and that he is the state's agent. Section 77-2712, before L.B. 1359, provided only that the state had a lien.

Although the State of Nebraska has not had any serious difficulty in this area, the change is aimed at giving the state an argument that the tax money should be paid first in the case of bankruptcy of the retailer. Some states have had losses run as high as three percent when the state could not get any priority over other creditors¹⁵³ through the use of a lien concept.¹⁵⁴

A trust fund is not an unusual theory.¹⁵⁵ Neither is it new. The New York statutory trust dates back to 1930.¹⁵⁶

The statutory lien is the traditional device used by the states to assure collection of both taxes and other claims. However, in proceedings under the Bankruptcy Act the lien may fail to achieve

¹⁵³ Remarks of Senator Burbach, Floor Debate on L.B. 1359, 80th Neb. Leg. Sess. (May 26, 1969). Presumably under the trust theory a criminal action would lie against a retailer who refused to turn over the tax receipts, since the money becomes the State's when received by the retailer.

¹⁵⁴ See ILL. ANN. STAT. ch. 120, §444(a) (Smith-Hurd 1968); N.C. GEN. STAT. § 105-164.37 (1965); PA. STAT. tit. 72, § 3403-548 (1964). For the type of situation the Tax Commissioner is trying to avoid in Nebraska see *First Nat'l Bank of Altoona v. Brown*, 27 Pa. D.&C.2d 569, (1961); *Gregory v. Bill's Auto Exchange, Inc.*, 29 Pa. D.&C.2d 285 (1962) where it was held in both cases that the state had no priority except as provided by the statute which protected prior mortgages of record.

¹⁵⁵ IND. ANN. STAT. § 64-2664(a) (Supp. 1969); MD. ANN. CODE art. 81, § 327 (Supp. 1969); OHIO REV. CODE ANN. § 5739.03 (Page Supp. 1969); WASH. REV. CODE ANN. § 82.08.050 (Supp. 1969).

¹⁵⁶ See, N.Y. LIEN LAW §§ 70 to 79 (McKinney 1966).

its purpose, since under section 67c, tax liens on personal property not accompanied by possession are postponed to administrative expenses and wage claims. The sales tax trust aspires to improve the states position over its customary lien statute; and the field seems clear to do it, since the Bankruptcy Act does not contain a direct limitation on the use of statutory trust formulas.¹⁵⁷

Perhaps the argument will be made that the trust is only a lien in reality and should therefore fall within the Bankruptcy Act. If it is only an effort to avoid the Bankruptcy Act, a court may regard it as such. However, if the trust as created is in harmony with the method of tax collection, there should be no reason to call the trust a lien merely because it is imposed by statute.¹⁵⁸

For this reason it is of considerable importance, whether the retailer is a collector of the tax or whether he is himself the taxpayer. Where the incidence of the tax falls on the purchaser, the retailer-trustee is simply a conduit. In that case the trust would appear to be consistent with the nature of the relation between the state and the retailer; the retailer's bare legal title as trustee is not out of place.¹⁵⁹

The incidence of the Nebraska tax is not entirely clear. On the one hand, the retailer is required to collect the tax from the consumer; on the other hand, the amount of the tax is a debt of the retailer to the state.¹⁶⁰ But, when read in conjunction with the section forbidding the retailer to advertise that he is absorbing the tax,¹⁶¹ and the section requiring separate listings of the sales tax,¹⁶² the indication is that the Legislature intended the incidence to fall on the purchaser. Therefore, the trust fund concept is consistent with the conceptual requirement that the tax fall on consumers. Assuming a valid trust, satisfaction of the state claim, before other creditors, may depend on the ability of the state to trace the proceeds of collection. The problem is vital where the merchant has not segregated the funds from others in the course of business.¹⁶³

¹⁵⁷ Note, *State Priority to Sales Tax Proceeds in Bankruptcy*, 40 IND. L.J. 233 (1965) (citations omitted).

¹⁵⁸ *Id.* at 235.

¹⁵⁹ *Id.* at 238.

¹⁶¹ NEB. REV. STAT. § 77-2703(1)(b) (Supp. 1967).

¹⁶² NEB. REV. STAT. § 77-2703(1)(c) (Supp. 1967).

¹⁶³ Note, *State Priority to Sales Tax Proceeds in Bankruptcy*, 40 IND. L.J. 233, 244 (1965) [hereinafter cited as Note, 40 IND. L.J.]. Senator Burbach indicated that the bill does not require setting up a custodial account, Floor Debate on L.B. 1359, 80th Neb. Leg. Sess. (May 26, 1969); Mr. Del Rasmussen, formerly Chief of the Legal Division of the Tax Commissioner's Office has said much the same thing, L.B. 1359, *Files of Revenue Committee*, 80th Neb. Leg. Sess. (Apr. 30, 1969).

Where there is no segregated fund, the government must, like any other beneficiary of a trust, follow the diverted fund into the property to which it can be traced.¹⁶⁴

2. *L.B. 1363—Withholding taxes constitute a trust fund in the hands of the employer.*

L.B. 1363 is identical in purpose to that of L.B. 1359. The money withheld by an employer from his employees for income taxes will constitute a trust fund held for the State of Nebraska. This, of course, is the type of system used by the federal government for collection and assessment of federal income taxes.¹⁶⁵

As with L.B. 1359, L.B. 1363 does not require the setting up of a separate account. Therefore, the same problem may arise, that is, the requirements of tracing, if the retailer or the employer commingles his funds with those of the state, and then becomes bankrupt.¹⁶⁶

It has been held that a bankrupt, owing social security and withholding taxes, who draws a check for the amount owed, and certifies it, effectively takes the fund out of the assets and from that moment, it belongs to the government, though the government never receives the check.¹⁶⁷ In *Mountaineer Engineering Co. v. Bosart*,¹⁶⁸ the check was mailed for the taxes, but was not honored because an attachment had been levied on the bank account in the interim. The court ruled that the check was not an assignment of the funds; that is, there was no tracing. It appears, therefore, in this area of considerable uncertainty, that the Legislature should require some type of separation of taxes from those of the retailer or employer to assure the effectiveness of the trust fund concept.

3. *L.B. 1361—Lien on property for taxes due.*

L.B. 1361 is a companion bill to L.B. 1359 and L.B. 1363. It amends section 77-27,104 of the Nebraska statutes and makes three changes or additions to the existing law.¹⁶⁹ It is aimed primarily at the collection of income taxes.¹⁷⁰

¹⁶⁴ Note, 40 IND. L.J., note 163 *supra*, at 244.

¹⁶⁵ INT. REV. CODE of 1954, § 7501.

¹⁶⁶ *Id.* § 7501 III(B)(1).

¹⁶⁷ Note, 40 IND. L.J., note 163 *supra*, at 245, *citing*, *In re State Motors, Inc.* 168 F. Supp. 82 (E.D. Mich. 1958).

¹⁶⁸ *Id.*, *citing*, 133 W. Va. 668, 57 S.E.2d 633 (1950).

¹⁶⁹ L.B. 1361 is very similar to the North Dakota statute relating to sales taxes. N.D. CENT. CODE § 39.2-13 (Supp. 1969). This statute is discussed in *In re Travis Bros. Body Works, Inc.*, 256 F. Supp. 716 (D.N.D. 1966).

¹⁷⁰ Remarks of Senator Burbach, Floor Debate on L.B. 1361, 80th Neb. Leg. Sess. (May 26, 1969).

First, the lien that the state has for failure to pay income or sales tax arises *at assessment* under L.B. 1361. The taxpayer no longer has sixty days within which to pay as he did under the law before amendment. The amendment is designed to bring this section into conformity with other parts of the 1967 Revenue Act.¹⁷¹

Second, the lien provided for will now attach to the *personal* as well as to the real property of the taxpayer. Under prior law the lien attached only to real property. It was felt that this addition would make the law more effective against transients owing income tax to the State of Nebraska, who have no real property, but do own some personal property, such as an automobile.¹⁷²

The third change, or addition, is designed to protect the state against advances on an existing mortgage, which were made after the state tax lien accrued. The bill provides:

[T]he lien herein provided, when notice thereof has been filed in the proper clerk's office, shall be subject to such prior mortgage *unless the Tax Commissioner also notified the mortgagee of the recording of such lien in writing*, in which case any indebtedness thereafter created from mortgagor to mortgagee shall be junior to the lien herein provided for.¹⁷³

Another purpose of L.B. 1361 was to clear up the language of the statute and serve as a backup measure to L.B. 1359 and L.B. 1363. Senator Burbach said:

This bill would aid and afford for the collection of sales and income tax both and in this instance it would provide that the lien would be there in the case of the income tax more explicitly than the sales tax and [where?] the trust fund is held up.¹⁷⁴

These bills certainly indicate a desire on the part of the eighth session of the legislature to "tighten up" on collection of taxes. L.B. 1415 goes so far as to create a criminal penalty and perhaps even interfere significantly with private contractual rights and/or remedies. L.B. 1359 and L.B. 1363 move away from the "traditional" device of a lien to the trust theory, which, if valid, will give the state a stronger position in collection of taxes. This trust theory also provides an avenue for criminal sanctions in extreme cases against an employer-retailer trustee who refuses to pay over tax monies. Taken together with L.B. 1361 these bills should reduce the amount of tax monies which the state is unable to collect.¹⁷⁵

¹⁷¹ Remarks of Mr. Del Rasmussen, formerly Chief of the Legal Division of the Tax Commissioner's Office, L.B. 1361, *Files of Revenue Committee*, 80th Neb. Leg. Sess. (Apr. 30, 1969).

¹⁷² *Id.*

¹⁷³ L.B. 1361, § 1(3), 80th Neb. Leg. Sess. (1969) (emphasis added).

¹⁷⁴ Floor Debate on L.B. 1361, 80th Neb. Leg. Sess. (May 26, 1969).

¹⁷⁵ It is interesting to note that these bills relate almost entirely to the sales and income taxes.

C. L.B. 504—CHANGES IN LANGUAGE AND SUBSTANCE OF TAX LAW.

Taxes were also the concern of L.B. 504, but most of the changes made by L.B. 504 are "merely perfunctory housekeeping measures."¹⁷⁶ It passed with the emergency clause.

The bill amends section 77-2702(10) (c) of the statutes by defining "admissions," for sales tax purposes, to mean "the right or privilege to have access or to use a place or location."¹⁷⁷ This is an attempt to clarify the definition in gray areas, but the intent is to broaden the meaning. With the passage of L.B. 504 such previously non-taxable events as the use or entry into golf courses, bowling alleys, pool tables and swimming pools will now be taxable.¹⁷⁸

L.B. 504 also amends section 77-2703 of the Nebraska statutes so that the tax on the sales of trailers and semi-trailers is now "[t]he liability of the purchaser"¹⁷⁹ making this the same as motor vehicles. County treasurers will now collect the sales tax on trailers and semi-trailers at the time application for registration is made by the purchaser of such trailer. It was felt that there is no basic difference between the sale of motor vehicles and trailers, and therefore if one group of retailers were to be exempted from liability under section 77-2703(1) (a), then the other should also be exempt.¹⁸⁰

Section 77-2704(5) originally provided that subsidiary companies could lease tangible personal property to the parent company without incurring sales tax liability, but it did not exempt the opposite practice. L.B. 504 amends this section to exempt leasing from parent to subsidiary and also "brother-sister" leasing arrangements, that is, where the construction company and the equipment company are owned by common shareholders. Also included in this section are joint ventures where it is necessary to have a separate company handling the equipment in order to recognize the contributions of the various parties and cost-plus work where it is desirable to have the equipment handled as a

¹⁷⁶ Remarks of Mr. Del Rasmussen of the Tax Commissioner's Office, L.B. 504, *Files of Revenue Committee*, 80th Neb. Leg. Sess. (Mar. 31, 1969).

¹⁷⁷ L.B. 504, § 1(10)(c), 80th Neb. Leg. Sess. (1969).

¹⁷⁸ Remarks of Senator Burbach, Floor Debate on L.B. 504, 80th Neb. Leg. Sess. (Aug. 11, 1969). Rule TC-1-44, *Amended Rules for Sales and Use Tax* (Oct. 1, 1969), includes: theatres, shows, parks, race tracks, skeet and trap ranges, zoos, football stadiums, art exhibits, night clubs, dance halls, cabarets, auditoriums where lectures and concerts are given, fairgrounds, and many other such events. *Id.* at 8.

¹⁷⁹ L.B. 504, § 2(1)(j), 80th Neb. Leg. Sess. (1969).

¹⁸⁰ Remarks of Mr. James Preston of the Nebraska Motor Carriers Assoc., L.B. 504, *Files of Revenue Committee*, 80th Neb. Leg. Sess. (Mar. 31, 1969).

separate item. This amendment is an effort to have the entities that reflect an enterprise within the heavy construction industry all receive the same treatment.¹⁸¹

As introduced, L.B. 504 would have removed the exemption of non-profit organizations from sales tax liability.

As the law stood before L.B. 504, a contractor could either be a "retailer" or a "consumer" of the supplies under a construction contract. The contractor could pay the tax to the supplier and pass it on to the owner, or he could himself be the retailer, getting a sales tax permit and giving the supplier a resale certificate. In the latter situation he would remit the sales tax from the customer to the state. The problems developed when dealing with exempt organizations, such as hospitals or governmental subdivisions.

If the contractor was the consumer, on a tax exempt job, he would pay the tax and apply for a refund from the state. In the application the contractor would have to include all invoices and statements from his supplier, which on a large contract would be a substantial number. This procedure was burdensome, and took up much time in both the Tax Commissioner's office and the contractor's office. Also, during the period of time during which invoices were checked, often several months, the contractor's money was tied up in taxes. This was especially hard on small contractors.¹⁸²

The contractor on a tax exempt job who was also the retailer would not pay the tax. Instead he would get a resale certificate, and accept from the exempt organization an exemption certificate in lieu of taxes.

The real problem arose because contracts for these organizations are often lump sum contracts. The law as interpreted provided that on a lump sum contract, the contractor could not be the retailer, but had to be a consumer, and "pay the tax on his supplies to his supplier regardless of whether he is performing a contract for an exempt organization"¹⁸³ and could not, of course, pass on

¹⁸¹ Remarks of Mr. Malcolm Young for Greater Omaha Heavy Contractors Assoc., L.B. 504, *Files of Revenue Committee*, 80th Neb. Leg. Sess. (Mar. 31, 1969).

¹⁸² Remarks of Mr. Dean Kratz, appearing for Nebraska Building Chapter of the Associated General Contractors; The Omaha Building Contractors Employers Assoc.; The Building Contractors Employers Assoc. of Lincoln; and The Tri-City Employers Assoc., L.B. 504, *Files of Revenue Committee*, 80th Neb. Leg. Sess. (Mar. 31, 1969).

¹⁸³ Rule TC-1-17, *Sales and Use Tax Rules and Regulations* 13 (as revised, March 1, 1968).

the tax. Therefore, contractors were paying sales tax for supplies used in a construction contract for many projects without reimbursement.

This attempt to remove the exemption met opposition. It was pointed out that if hospitals are not exempted, the cost on a \$15,000,000 project would be increased \$300,000. With hospital beds costing \$20,000, the number of beds would be reduced by fifteen. The same would apply to nursing homes, already in short supply. On a \$5,000,000 project, with beds costing \$10,000 each, the number of beds would be reduced by ten at a sales tax rate of two percent.¹⁸⁴

As passed, the bill provides that a contractor will always be a consumer, passing the tax on to the customer. In the case of an exempt organization, a refund to it will be calculated by multiplying the sales or use tax rate times a sum equal to sixty percent of the total contract price. The figure of sixty percent, which is to represent the cost of supplies in the contract, was worked out by those interested in the area.¹⁸⁵ The organization claiming the exemption will have to submit any evidence as required by the Tax Commissioner to establish such total contract price.

The bill also defines the location of the taxable event for the purpose of the Local Option Revenue Act authorized by L.B. 578.¹⁸⁶ It redefines gross receipts of telegraph service to mean only intrastate service,¹⁸⁷ to be in harmony with the furnishing of telephone communications service on intrastate tolls. It makes "community antenna television system" (cable TV) consonant with the definition of retailer in section 77-2702(12) (a) (iv)¹⁸⁸ of the Nebraska statutes.

VII. MOTOR VEHICLES

A. L.B. 1174—TITLE TO MOTOR VEHICLES.

The Legislature made an important change in the acquisition of title to a motor vehicle with the passage of L.B. 1174. It passed with the emergency clause.

The bill provides that no title shall pass unless the buyer has *physical possession* of the vehicle and:

¹⁸⁴ Remarks of Mr. Stuart Mount of the Nebraska Hospital Assoc., L.B. 504, *Files of Revenue Committee*, 80th Neb. Leg. Sess. (Mar. 31, 1969).

¹⁸⁵ Remarks of Senator Burbach, Floor Debate on L.B. 504, 80th Neb. Leg. Sess. (Aug. 11, 1969).

¹⁸⁶ Generally the retailer's place of business.

¹⁸⁷ L.B. 504, § 1(4) (b) (ii), 80th Neb. Leg. Sess. (1969).

¹⁸⁸ L.B. 504, § 1(12) (a) (iv), 80th Neb. Leg. Sess. (1969).

[A] certificate of title or a manufacturer's or importer's certificate duly executed in accordance with the provisions of this act, and with such assignments thereon as may be necessary to show title in the purchaser thereof or an instrument in writing required by section 60-1417. . . .¹⁸⁹

L.B. 1174 amends section 60-105 of the Nebraska statutes which had provided that for title to pass the purchaser must only "have had issued to him a certificate of title . . . or delivered to him a manufacturer's or importer's certificate."¹⁹⁰ As a result of that law, the liability was upon the seller, that is, the "owner," for any accident which occurred between the time the buyer took possession and when he would get a certificate issued to him.¹⁹¹ For example, this situation would arise where the sale was made in the evening, on a Saturday or Sunday, or on a holiday, so that the purchaser could not get a new title issued to him immediately. Therefore, automobile dealers have had to carry insurance on these cars, and it has been a source of trouble.¹⁹²

L.B. 1174 represents a significant change in the law. Cases in this area have spoken of the certificate of title as "conclusive of ownership"¹⁹³ or similar terms. Consider, for example, the result in the *Turpin* case¹⁹⁴ under the law as L.B. 1174 establishes it, if the alleged contract for sale could have been produced. The Nebraska Supreme Court there said:

Even assuming that there was such a contract . . . Turpin was not the owner of the Buick automobile and could not be until such time as he produced the certificate of title thereto¹⁹⁵

¹⁸⁹ L.B. 1174, § 1(1) (emphasis added). NEB. REV. STAT. § 60-1417 (Reissue 1968) provides sales of motor vehicles shall be evidenced in writing and lists certain requirements of the instrument.

¹⁹⁰ See, NEB. REV. STAT. § 2-401 (U.C.C. 1964). The comment to this section states: "This section, however, in no way intends to indicate which line of interpretation should be followed in cases where the application of 'public' regulation depends upon a 'sale' or upon 'title' without further definition."

¹⁹¹ L.B. 1174, *Files of Public Works Committee*, 80th Neb. Leg. Sess. (1969). See, *Turpin v. Standard Reliance Ins. Co.*, 169 Neb. 233, 99 N.W.2d 26 (1959).

¹⁹² Remarks of Senator Luedtke, Floor Debate on L.B. 1174, 80th Neb. Leg. Sess. (May 1, 1969).

¹⁹³ *State Farm Auto Ins. Co. v. Drawbaugh*, 159 Neb. 149, 65 N.W.2d 542 (1954); *Garbark v. Newman*, 155 Neb. 188, 51 N.W.2d 315 (1952).

¹⁹⁴ *Turpin v. Standard Reliance Ins. Co.*, 169 Neb. 233, 99 N.W.2d 26 (1959). In this case Turpin allegedly signed a contract to take over payments on an auto owned by Jones, who was leaving for the service. He did not get the certificate but used the auto for three days before he was involved in an accident with the auto. After a "diligent search" the alleged contract could not be found, and Turpin testified that he could not remember signing a contract.

¹⁹⁵ *Id.* at 249, 99 N.W.2d at 36.

The bill also has more effect than merely the fixing of liability during the time period between sale and issuance of a new certificate of title to the buyer, although this was apparently the only concern of the legislature in amending the prior law. A purchaser with a written instrument, such as a bill of sale, and possession of the automobile will prevail over a purchaser who has a certificate of title. Suppose *S* sells the car to *K* who takes possession and receives a receipt for it in early July. *K* asks for the certificate of title, but *S* does not have it. It is being held by the finance company. Plaintiff then buys the car from *S* for cash and pays off the lien. *S* gives an employee of the plaintiff the power of attorney to assign the certificate of title to the plaintiff. Plaintiff gets a certificate of title issued to him on July 25. In an action between plaintiff and *K*; *held*: plaintiff had the certificate of title and was therefore the owner of the auto.¹⁹⁶ The result would be the opposite under L.B. 1174.

L.B. 1174 upsets the reliance an individual may place upon the certificate of title as an indication of ownership. If the legislature had desired to take care of the problem of fixing liability only, it would seem that it could have done so without disturbing property law.

L.B. 1174 also amends section 60-106 of the Nebraska statutes, in providing that in *all* instances the certificate of title shall be obtained by the purchaser.¹⁹⁷ The law originally provided that in the sale of an automobile by a dealer to a "general purchaser or user" that the dealer was required to obtain the certificate in the name of the purchaser.

B. L.B. 994—RIGHT-OF-WAY AT INTERSECTIONS.

The Legislature amended section 39-751 of the Nebraska statutes relating to the right-of-way at intersections with L.B. 994.¹⁹⁸ It passed with the emergency clause.

The change in the law conforms to actual usage, the law of other states¹⁹⁹ and the latest revision of the Uniform Vehicle Code. The emphasis is on defensive driving.²⁰⁰

¹⁹⁶ *Loyal's Auto Exchange, Inc. v. Munch*, 153 Neb. 628, 45 N.W.2d 913 (1951).

¹⁹⁷ L.B. 1174, § 2(5), 80th Neb. Leg. Sess. (1969).

¹⁹⁸ L.B. 448, a companion bill, amends NEB. REV. STAT. § 39-728 (Reissue 1968), defining right-of-way for autos entering an intersection from different highways.

¹⁹⁹ See, COLO. REV. STAT. ANN. § 13-5-52 (1963); KAN. STAT. ANN. § 8-551 (Supp. 1968); MICH. COMP. LAWS ANN. § 257.650 (1967); MINN. STAT. ANN. § 169.20(2) (1960); MO. ANN. STAT. § 304.021(2) (1959); WYO. STAT. ANN. § 31-119 (Reissue 1967).

²⁰⁰ L.B. 994, *Files of Public Works Committee*, 80th Neb. Leg. Sess. (1969).

Before amendment, section 39-751 stated, *inter alia*, that the driver of a vehicle approaching but not having entered an intersection must yield to a vehicle within the intersection and turning left therein across the line of travel of the first vehicle. L.B. 994 provides:

The driver of a vehicle intending to turn left within an intersection . . . shall yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard.²⁰¹

It would appear that in most instances the revision would give the right-of-way to the auto approaching the intersection over the auto in the intersection turning left, while the prior law would have given it to the one turning left.²⁰² However, it was stated in committee that the vehicle in the intersection turning left has the right-of-way.²⁰³

It is significant that research reveals very few cases in which violation of the statute in its original form ever arose as an issue. But in those states which have statutes similar to L.B. 994, there are many illustrations of how the statute is applied in auto accident cases.

In such states compliance or non-compliance with the statute is most often invoked in rear-end collisions rather than in collisions between two autos approaching an intersection from opposite directions. The plaintiff, stopped in the intersection, is hit by the defendant. In response to a charge of contributory negligence, plaintiff argues that he has stopped in the intersection to yield to approaching traffic as required by the law.²⁰⁴ Other cases involve a situation where the defendant is hit from behind and the plaintiff alleges as negligence the defendant's stop on the highway. The defendant then invokes the statute to show he was not negligent.²⁰⁵

²⁰¹ L.B. 994, § 3, 80th Neb. Leg. Sess. (1969).

²⁰² Senator Orme stated that the bill is only a clarification with a bit of alteration and wording simplified, perhaps implying no great substantive change in the law. Floor Debate on L.B. 994, 80th Neb. Leg. Sess. (April 1, 1969).

²⁰³ Remarks of Mr. Ralph Nelson, L.B. 994, *Files of Public Works Committee*, 80th Neb. Leg. Sess. (Mar. 7, 1969).

²⁰⁴ *Lund v. Minn. Street Rwy. Co.*, 250 Minn. 550, 86 N.W.2d 78 (1957). In *Wilson v. Sorge*, 256 Minn. 125, 127, 97 N.W.2d 477, 480 (1959) the court said: "Plaintiff's conduct in the operation of her vehicle was in accord with the rules of the road. . . . She also decreased her speed and then stopped to yield the right-of-way to the oncoming vehicle as she was required to do." (citations omitted).

²⁰⁵ *Gustafson v. Schilt*, 263 Minn. 294, 116 N.W.2d 557 (1962). Under Nebraska's range of vision rule the plaintiff in the hypothetical case would quite likely be negligent as a matter of law and thus would

L.B. 994 contains a very definite jury issue. It states that the one in the intersection intending to turn left must yield to the one approaching from the opposite direction in the intersection "or so close thereto as to constitute an immediate hazard."²⁰⁶ What is an immediate hazard? Will the distance from the intersection which constitutes an immediate hazard be the same on a rainy day as on a sunny day? On a gravelled road as on pavement? When the approaching vehicle is a heavily loaded truck or a small compact car? These appear to be questions of fact and are for jury determination.²⁰⁷

At first glance a bill of this nature may appear to be relatively insignificant, but the experience of other states shows that it may become a widely invoked statute in tort cases. At least the situation may arise in which it will be important in the outcome of a case.

Craig W. Thompson '71
William J. Wochner '71

not instigate the litigation. See, Schmeling, *The Range of Vision Rule in Nebraska*, 49 NEB. L. REV. 7, (1969); Newkirk v. Kovanda, 184 Neb. 127, 165 N.W.2d 576 (1969), discussed in, *Nebraska Supreme Court Review*, 49 NEB. L. REV. 537, 582 (1970).

²⁰⁶ L.B. 994, § 1(3), 80th Neb. Leg. Sess. (1969).

²⁰⁷ Mahan v. Kansas City Public Service Co., 158 Kan. 206, 146 P.2d 383; Gardner v. Pereboom, 197 Kan. 188, 416 P.2d 67 (1966). These cases involve KAN. STAT. ANN. § 8-551 (Supp. 1968) and its predecessor statute which contained the identical language.